

## UNITED STATES DISTRICT COURT

## DISTRICT OF NEVADA

\* \* \*

MICHAEL THOMAS DAVITT,

Case No. 3:22-cv-00381-MMD-CSD

Petitioner,

ORDER

v.

ELKO COUNTY SHERIFF,

Respondent.

Michael Thomas Davitt has submitted a *pro se* 28 U.S.C. § 2241 habeas corpus petition. (ECF No. 1-1.) But on initial review, the Court finds that Davitt's claims appear unexhausted, and that federal abstention is required, so the petition is dismissed without prejudice.

Davitt states that he was arrested on July 1, 2022, and is in the custody of the Elko County Sheriff. (*Id.* at 2.) In his petition for federal habeas relief, he alleges that he was not brought before a judge within 72 hours, that he was denied a phone call to post bond for 33 days, and that his public defenders are rendering ineffective assistance of counsel. (*Id.* at 6.) Because a federal habeas petitioner incarcerated by a state must give state courts a fair opportunity to act on each of his claims before he presents them in a federal habeas petition, federal courts will not consider his petition for habeas relief until he has properly exhausted his available state remedies for all claims raised. See *Boyd v. Thompson*, 147 F.3d 1124, 1128 (9th Cir. 1998). A claim remains unexhausted until the petitioner has given the highest available state court the opportunity to consider the claim through direct appeal or state collateral-review proceedings. See *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999); *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc). To properly exhaust state remedies on each claim, the habeas

1 petitioner must “present the state courts with the same claim he urges upon the federal  
2 court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971).

3 The federal constitutional implications of a claim, not just issues of state law, must  
4 have been raised in the state court to achieve exhaustion. See *Woods v. Sinclair*, 764  
5 F.3d 1109, 1129 (9th Cir. 2014); *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir.  
6 2005) (finding that fair presentation requires both the operative facts and federal legal  
7 theory upon which a claim is based). A claim is not exhausted unless the petitioner has  
8 presented to the state court the same operative facts and legal theory upon which his  
9 federal claim is based. See *Bland v. California Dep’t of Corrections*, 20 F.3d 1469, 1473  
10 (9th Cir. 1994).

11 Davitt states that he has exhausted this petition. However, the Court takes judicial  
12 notice of the fact that he submitted this petition less than two months after he was  
13 arrested, and it would be impossible to pursue relief at the state district court and state  
14 appellate levels in that short time. The Court also takes judicial notice of the Nevada  
15 appellate courts’ online records, which do not show any appeal from a denial of a state §  
16 2241 habeas petition. This alone bars this Court’s consideration of his federal habeas  
17 petition.

18 But even if the Court assumed that Davitt has exhausted his claims, his petition  
19 seeks federal judicial intervention in a pending state criminal proceeding, which is simply  
20 not available to him. *Cf., e.g., Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983);  
21 *Carden v. Montana*, 626 F.2d 82, 83-85 (9th Cir. 1980). The comity-based *Younger*  
22 abstention doctrine prevents federal courts from enjoining pending state court criminal  
23 proceedings, even if there is an allegation of a constitutional violation, unless there is an  
24 extraordinary circumstance that creates a threat of irreparable injury. See *Younger v.*  
25 *Harris*, 401 U.S. 37, 53-54 (1971).

26 The United States Supreme Court has instructed that “federal-court abstention is  
27 required” when there is “a parallel, pending state criminal proceeding.” *Sprint Commc’ns,*  
28 *Inc. v. Jacobs*, 571 U.S. 69, 72 (2013) (emphasis added); *Gilbertson v. Albright*, 381 F.3d

1 965 (9th Cir. 2004) (federal courts generally abstain from granting any relief that would  
2 interfere with pending state judicial proceedings). Injuries are only irreparable if the threat  
3 to a petitioner's federally protected rights cannot be eliminated through his defense of the  
4 criminal case. See *Younger*, 401 U.S. at 46.

5 This case does not present extraordinary circumstances. Davitt challenges the  
6 alleged delay in posting bond and argues that his counsel is rendering ineffective  
7 assistance. (ECF No. 1-1 at 6.) Defendants in state criminal proceedings routinely allege  
8 that state criminal proceedings violate their constitutional rights, including fundamental  
9 rights, which makes this a regular occurrence, not an extraordinary circumstance. Davitt's  
10 situation is no different in substance from that of any criminal defendant facing the  
11 potential loss of constitutional rights—including the most fundamental right, to liberty—in  
12 a pending criminal prosecution. He faces no extraordinary or irreparable injuries, so  
13 federal abstention is required. It does not appear that dismissal of this action without  
14 prejudice will materially impact the analysis of any issue in a later-filed habeas proceeding  
15 or otherwise result in substantial prejudice.

16 The Clerk of Court is directed to file the petition for writ of habeas corpus. (ECF  
17 No. 1-1.)

18 It is further ordered that the petition is dismissed without prejudice.

19 It is further ordered that the Clerk of Court direct informal electronic service upon  
20 Respondents by adding Nevada Attorney General Aaron D. Ford as counsel for  
21 Respondents and sending a notice of electronic filing to his office for the petition and this  
22 order. No response is required from Respondents other than to respond to any orders of  
23 a reviewing court.

24 The Clerk of Court is further directed to enter final judgment dismissing this action  
25 and close this case.

26 DATED THIS 2<sup>nd</sup> Day of November 2022.

27   
28 MIRANDA M. DU  
CHIEF UNITED STATES DISTRICT JUDGE